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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NIPPON PAPER INDUSTRIES CO., LTD.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO THE UNITED STATES' SECOND OPPOSITION BRIEF

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In The

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Nippon Paper Industries Co., Ltd.,

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REPLY TO THE UNITED STATES' SECOND OPPOSITION BRIEF

ARGUMENT

The government fails to come to grips with, let alone rebut, the serious issues raised by its unprecedented criminal application of the Sherman Act to wholly foreign conduct 107 years after the Act's passage. The government's inability to address these fundamental issues reveals the hollowness of its claim that Congress in 1890 intended the Sherman Act to subject citizens of foreign countries to criminal sanctions for business conduct undertaken entirely outside the United States. Consider a few examples of what the government ignores:

- The interpretive rules and traditions at the time the Sherman Act was passed -- the pivotal determinants of legislative intent in the absence of express statutory language. *See, e.g., Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 71 (1992). The case law and treatises at the time clearly establish that the 1890 Congress could not have intended to give extraterritorial effect to the criminal provisions of the Sherman Act for two independent reasons: (1) criminal statutes then were clearly understood not to apply extraterritorially unless Congress expressly so provided, and (2) criminal statutes were construed more narrowly than civil statutes, even if that meant giving different constructions to the same language in statutes with singular criminal and civil prohibitions. Pet. at 14-19. One can only assume that the government ignores this essential legislative context and hangs its hat on modern-day policy arguments that have no bearing on congressional intent in 1890 because it has no way to harmonize its case with these historic traditions.

- Fundamental differences between the rules governing the interpretation of criminal and civil enforcement prohibitions. For instance, while the government relies on one passage in an 1887 State Department report to argue that the extraterritorial application of criminal statutes was "firmly established" by 1890, Gov. Br. at 10, it ignores the report's acknowledgement just pages later that "[i]n the United States the territorial principle is the basis of criminal jurisprudence, and the place of the commission of an offense is generally recognized as the proper and only place for its punishment." U.S. Department of State, *Report on Extraterritorial Crime and The Cutting Case* 56 (1887). The

State Department report makes clear that whatever exceptions to this rule may have existed for criminal law, "in no case is the exception of such a character as to involve or imply an assertion by the United State (sic) of jurisdiction over the territory of another nation." *Id.* at 57.

- This Court's holdings in *United States v. Coolidge,* 14 U.S. 415 (1816) and *United States v. Hudson and Goodwin,* 11 U.S. 32 (1812), which establish that federal courts may not, as the First Circuit did, expand the reach of criminal law beyond what Congress expressly provided because doing so impermissibly creates what is tantamount to a federal criminal common law. *See* Jean Edward Smith, *John Marshall: Definer of A Nation* 284 (1996) (discussing Chief Justice Marshall's rejection of the view that, if Congress had failed to act, courts must punish the "crime" even "without the authority of statute.").

The arguments the government offers to challenge the need for immediate Court review are unpersuasive. Like its first opposition brief, the government's second submission offers nothing to question the need for immediate review by this Court to resolve the important issues raised by this Petition -- issues that implicate the vitality of this Court's precedents, future applications of the Sherman Act and other statutes with singular civil and criminal prohibitions, and strategic relations with foreign governments.

1. Like the First Circuit, the government relies on *United States v. Thompson/Center Arms Co.,* 504 U.S. 505 (1992) and *Ratzlaf v. United States,* 510 U.S. 135 (1994), to support its contention that *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), a civil case, *ipso facto*

controls interpretation of the statute in a criminal case. In so arguing, the government evinces a fundamental misunderstanding -- displayed throughout the brief -- of the distinctive standards applied to civil and criminal provisions, and the reasons underlying them. Criminal provisions, unlike their civil counterparts, are construed strictly in order to protect the rights of criminal defendants to notice and fair warning of the scope of criminal prohibitions. This is why the rule of lenity is a criminal, not a civil, rule. This is why, in the rare instances in which criminal statutes have been extended to foreign conduct, Congress has used express language that precisely identifies the circumstances to which such statutes apply.[1] The government has proffered no evidence that the boilerplate language in the Sherman Act (defining its reach as "trade or commerce . . . with foreign nations," 15 U.S.C. § 1 (1994)) satisfies this heightened standard of legislative expression.

Thompson/Center and *Raztlaf* do not help. *Thompson/Center* holds that a narrow construction must be given to the civil applications of a statute with singular civil and criminal provisions in order to protect the interpretive

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[1] *See, e.g.*, Maritime Drug Law Enforcement Act, 21 U.S.C. § 959(c) (1994) ("This section is intended to reach acts of manufacture or distribution [with intent to import] committed outside the territorial jurisdiction of the United States."); Money Laundering Control Act of 1986, 18 U.S.C. § 1956(f) (1994) ("There is extraterritorial jurisdiction over the conduct prohibited by this section if . . . in the case of a non-United States citizen, the conduct occurs in part in the United States.").

principles governing criminal statutes and to preserve the heightened protections afforded criminal defendants. The government's attempt to leverage an expansive civil interpretation of the Sherman Act into a broad criminal application of the same prohibition clearly contravenes *Thompson/Center*. And *Ratzlaf* simply holds that a single phrase used multiple times in a criminal statute should be afforded the same meaning throughout. That holding has no bearing on whether a statute with singular civil and criminal prohibitions should be construed without regard for the different interpretive standards that apply to criminal and civil provisions.

2. The government's discussion of other cases is no more compelling. Contrary to the government's assertion, *see* Gov. Br. at 7, *American Banana* clearly did involve effects in the United States arising from the export by subsidiaries of American companies of bananas from Central America into the United States. Nonetheless, the Court declined to extend the Sherman Act to conduct entirely outside of the United States because, it said, the presumption against extraterritoriality had not been overcome.

Steele v. Bulova Watch Co., 344 U.S. 280, 286 (1952) and *Strassheim v. Daily,* 221 U.S. 280 (1911), also are inapplicable. *Steele*, unlike this case, involved overt acts within the United States that clearly fell within the Lanham Act's express jurisdictional reach. And *Strassheim* did not involve, as here, a pure question of statutory interpretation about whether Congress intended to export American criminal law. It simply restated the federalist principle that

a citizen of one of the United States could, under certain circumstances, be tried in another State.[2]

Unassisted by the case law, the government falls back on the unexceptionable argument that Congress has the power to make the conduct at issue subject to United States criminal law. But the power Congress wields is irrelevant. The only issue is whether Congress in 1890 *exercised* that power. The weight of the historical evidence proves that it did not.

3. The government's claim that the Restatement (Third) of Foreign Relations Law § 403 (1986) simply restates the traditional presumption against extraterritoriality ignores the express language of the Restatement itself. The presumption against extraterritoriality clearly applies in both civil and criminal cases, *see, e.g., EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) but the comments to the Restatement make clear that extraterritorial application is granted "more sparingly" in criminal, rather than civil, laws "over the same activity" due to the greater impingement upon the sovereignty of foreign nations. Restatement, §

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[2] The government's only response to *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), is to claim that it "does not support construing the Act's *express* jurisdictional reach differently in civil and criminal actions." Gov. Br. at 8 (emphasis supplied). This argument cannot cabin *Gypsum*'s broad holding that civil Sherman Act precedents do not automatically govern parallel criminal proceedings. Moreover, the Sherman Act contains jurisdictional language that is no more express than the spare language bearing on the *mens rea* issue considered in *Gypsum*.

403, Reporters' Note 8. Indeed, the comments to the Restatement also distinguishes between the civil antitrust enforcement prohibitions, which may be given extraterritorial effect, and their criminal analogues, which should not be. *See id.* § 403, cmt. f.

4. The government's response to Petitioner's claim that the First Circuit's decision will impair the remedial purposes of the Sherman Act's civil enforcement machinery entirely misses the point. The government claims that Petitioner's argument is "based on the assumption . . . that courts will narrowly construe the Sherman Act's standard of conduct in civil cases to avoid creating an ambiguous standard that might later apply in criminal cases." Gov. Br. at 11. But the First Circuit's opinion would have pernicious results even where courts, in construing a case of first impression, have promulgated a clear and definite interpretation of the Act's civil provisions that has a clear and definite impact on the Act's criminal provisions, or vice versa. If the First Circuit opinion stands, then the Sherman Act (and other statutes with singular civil and criminal enforcement provisions) will have to be interpreted in the same manner, civilly and criminally. That means that either the criminal rules of strict construction will apply in civil cases, thereby preventing courts from exercising their broad authority to develop what in essence is a civil common law of antitrust,[3] or, as the government appears to assume, liberal rules of construction will be used in both civil and criminal cases,

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[3] *See* I Phillip E. Areeda & Donald F. Turner, *Antitrust Law,* ¶ 106, at 15 (1978).

thereby depriving criminal defendants of fundamental protections.

5. Petitioner's due process claim is properly before the Court. Petitioner raised the question of adequate notice before the district and appellate courts. *See* Dist. Ct. Br. at 6; App. Br. at 27-31. Indeed, Petitioner's arguments based on the rule of lenity emphasized the need for notice, predictability and fairness, which are the gravamen of procedural due process. The district court recognized as much when it held that giving the Sherman Act's criminal provisions extraterritorial effect "would present serious question about notice to foreign corporate defendants as to the criminality of its conduct." Pet. App. 48a. The court's opinion clearly preserves the issue. In any event, the case law firmly establishes that where, as here, important legal matters are raised, courts may hear the claim. *See, e.g.*, *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995); *United States v. Northrop Corp.*, 59 F.3d 953, 957 n.2 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 2550 (1996).

On the merits, the government's attempt to question the need for Court review of Petitioner's due process claim is weak. While the government relies on *United States v. Aluminum Co. of America* ("*Alcoa*"), 148 F.2d 416 (2d Cir. 1945), a civil case, to refute Petitioner's due process claims, the government again fails to take account of the distinction between the interpretive principles governing criminal, as opposed to civil, provisions. Petitioner has marshalled a wealth of evidence to establish, *inter alia*, that at the time of the Sherman Act's passage, criminal statutes were interpreted

based on different principles of statutory construction than were civil statutes. *See* Pet. at 14-19.

The fact is that in 1990 when Petitioner was alleged to have entered into a conspiracy in Japan to fix prices on sales to other companies in Japan there was no case that provided fair notice that Petitioner could be indicted criminally under the Sherman Act.[4] The idea that Petitioner should have speculated otherwise is almost absurd when one considers the fact that four Justices of this Court in 1993 did not believe that even the *civil* provisions of the Sherman Act should be given extraterritorial effect, notwithstanding *Alcoa* and notwithstanding the fact that the conspiracy in *Hartford Fire* was crafted and supervised by United States actors. *See Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 814-22 (1993) (Scalia, J., joined by O'Connor, Kennedy and Thomas, JJ., dissenting).

6. The government's suggestion that because "the allegations in the indictment clearly allege co-conspirator conduct in the United States," Gov. Br. at 13, a trial will go forward in any event is mythical. After careful review of the indictment, the district court concluded that the government failed sufficiently to allege a conspiracy involving any U.S. actors. *See* Pet. App. at 42a-45a. While the court of appeals did not reach the issue, there is no

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[4] Indeed, even the Congressional Research Service did not include the Sherman Act in its list of criminal statutes with extraterritorial effect. *See* CRS Report for Congress, *Extraterritorial Application of American Criminal Law* 23-28 (September 11, 1992).

reason to believe that the district court will somehow reconsider its carefully reasoned ruling. The allegations in the indictment have not changed, and those facts "do not satisfy the government's burden of pleading with requisite particularity the existence of a vertical agreement." Pet. App. at 45a.

CONCLUSION

For the reasons stated above and in Nippon's Petition for Writ of Certiorari, the petition should be granted.

Respectfully Submitted,

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